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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BONA FIDE CONGLOMERATE, INC.,
12 Plaintiff,

13 v.

14 SOURCEAMERCA; PRIDE
15 INDUSTRIES, INC.; KENT, CAMPA &
16 KATE, INC.; SERVICESOURCE, INC.;
17 JOB OPTIONS, INC.; GOODWILL
18 INDUSTRIES OF SOUTHERN
19 CALIFORNIA; LAKEVIEW CENTER,
20 INC.; THE GINN GROUP, INC.;
21 CORPORATE SOURCE, INC.; CW
22 RESOURCES; NATIONAL COUNCIL
23 OF SOURCEAMERICA EMPLOYERS;
24 and OPPORTUNITY VILLAGE, INC.,
25
26

27 Defendants.
28

Case No.: 3:14-cv-00751-GPC-AGS

ORDER

**(1) GRANTING IN PART AND
DENYING IN PART BONA FIDE'S
MOTION TO EXCLUDE THE
TESTIMONY OF MARY KAREN
WILLS [ECF No. 561];**

**(2) GRANTING IN PART AND
DENYING IN PART
SOURCEAMERICA'S MOTION TO
EXCLUDE THE TESTIMONY OF
KEVIN M. JANS [ECF No. 521];**

**(3) GRANTING IN PART AND
DENYING IN PART
SOURCEAMERICA's MOTION TO
STRIKE DECLARATIONS OF
KEVIN M. JANS [ECF No. 575].**

1 SOURCEAMERICA,
2 Counterclaimant,
3 v.
4 BONA FIDE CONGLOMERATE, INC.;
5 and RUBEN LOPEZ,
6 Counterdefendants.

7 Pending before the Court are three motions pertaining to expert testimony. On
8 July 13, 2018, Defendant SourceAmerica filed a motion to exclude the expert testimony
9 of Kevin M. Jans (ECF No. 521). This motion has been fully briefed. (ECF Nos. 546,
10 572.) On August 6, 2018, Plaintiff Bona Fide filed its motion to exclude the expert
11 testimony of Mary Karen Wills, (ECF No. 561), which has similarly received the benefit
12 of full briefing. (ECF Nos. 550, 573.) Thereafter, SourceAmerica moved to strike two
13 nearly-identical declarations by Mr. Jans (ECF No. 575); the declarations at issue had
14 been submitted by Bona Fide in opposition to SourceAmerica's motion for summary
15 judgment and to SourceAmerica's motion to exclude Mr. Jans's testimony. BonaFide
16 submitted a response to the motion to strike (ECF No. 585); SourceAmerica filed no
17 reply.

18 Having considered the applicable law and the parties' arguments, the Court holds
19 as follows: Bona Fide's motion to exclude the testimony of Mary Karen Wills is **granted**
20 **in part** and **denied in part** (ECF No. 561). SourceAmerica's motion to exclude the
21 testimony of Kevin M. Jans is **granted in part** and **denied in part** (ECF No. 521).
22 SourceAmerica's motion to strike portions of Mr. Jans's declarations is also **granted in**
23 **part** and **denied in part** (ECF No. 575).¹

24 I. BACKGROUND

25 The AbilityOne Program is a public-private procurement system designed to fulfill
26

27 ¹ The Court considered all of the arguments presented in all the foregoing motions, even those not
28 discussed in this Order. To the extent that arguments are not acknowledged in this Order, they are rejected.

1 the objectives of the Javits-Wagner-O-Day (“JWOD”) Act, 41 U.S.C. § 8501 *et seq.*, by
2 requiring federal agencies to purchase select products and services from Non-Profit
3 Agencies (“NPA”s) that provide employment and training opportunities for persons who
4 are blind or have severe disabilities. 41 C.F.R. § 51-1.1. The AbilityOne Program is
5 administered by the AbilityOne Commission (“AbilityOne Commission”), which in turn
6 has designated SourceAmerica as a Central Nonprofit Agency (“CNA”) responsible for
7 helping it carry out its mission under the JWOD Act.

8 As a CNA, SourceAmerica helps to recommend and design service contracts,
9 named “Opportunities,” for participating NPAs to bid on. In this capacity,
10 SourceAmerica “functions as a technical evaluation panel and makes recommendations to
11 the Commission on the qualifications and abilities of prospective nonprofit agencies to
12 perform the work.” *Nat’l Telecommuting Inst., Inc. v. United States*, 123 Fed. Cl. 595,
13 598 (2015). First, SourceAmerica communicates with the procuring government agency,
14 i.e., the federal customer, about its need for a particular service, whether it is for grounds
15 maintenance, or IT, or childcare. Then, based on those inputs, SourceAmerica crafts
16 Opportunity Notices, or Sources Sought Notices (“SSNs”), which communicate to NPAs
17 the particular scope and requirements of the service sought. Sometimes those Notices
18 include mandatory requirements, such as certain levels of security clearance, or prior
19 work history in the specific service industry. Sometimes, they will express preferences
20 for NPAs with geographic experience, or other such criteria. After collecting responses
21 from interested NPAs, SourceAmerica assesses the NPAs’ proposals for their ability to
22 perform the service requested, and based off of its appraisal, selects one NPA to
23 recommend to the AbilityOne Commission for approval. With rare exceptions, the
24 AbilityOne Commission will accept SourceAmerica’s recommendation as the contractor.
25 The entirety of this process has been interchangeably referred to by the parties as the
26 source-selection process, the acquisitions process, the NPA recommendation process,
27 among other things.

28 Bona Fide is an NPA that received a number of AbilityOne projects in the mid to

late 2000's. However, as a result of two bid protests not at issue here, Bona Fide's relationship with SourceAmerica soured in the ensuing years. In 2012, the parties signed a Settlement Agreement (the "Settlement Agreement") resolving their bid protest disputes. The Settlement Agreement obligated SourceAmerica to "use best efforts to provide that Bona Fide is treated objectively, fairly, and equitably in its dealings with [SourceAmerica], with specific attention to contract allocation." (ECF No. 519-4, at 7.)

Significantly, since the execution of the Settlement Agreement, Bona Fide has received no recommendations for contracts from SourceAmerica. In response, Bona Fide filed a complaint that SourceAmerica breached its obligations under the Settlement Agreement, alleging, *inter alia*, that SourceAmerica's source-selection process was plagued by conflicts of interests and biases against Bona Fide. SourceAmerica denied those allegations and moved for summary judgment on Bona Fide's summary judgment claims.

As relevant to the motions at hand, SourceAmerica and Bona Fide have proffered two dueling expert witnesses—Ms. Wills, and Mr. Jans, respectively—to support their theories of the case. Both sides have moved to exclude each other's witnesses.

II. LEGAL STANDARD

The trial judge must act as the gatekeeper for expert testimony by carefully applying Federal Rule of Evidence 702 to ensure specialized evidence is "not only relevant, but reliable." *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 589 & n.7 (1993) ("*Daubert I*"). The Court's obligation "to scrutinize carefully the reasoning and methodology underlying [expert] affidavits" applies even on summary judgment. *Houle v. Jubilee Fisheries, Inc.*, No. C04-2346JLR, 2006 WL 27204, at *5 (W.D. Wash. Jan. 5, 2006) (quoting *Daubert I*, 509 U.S. at 501)). An expert witness may testify

if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the witness has reliably applied the principles and methods reliably to the facts of the case.

1 Fed. R. Evid. 702. The proponent of the evidence bears the burden of proving the
2 expert's testimony satisfies Rule 702. *Cooper v. Brown*, 510 F.3d 870, 880 (9th Cir.
3 2007).

4
5 The Court has broad discretion in exercising its gatekeeping function, *United*
6 *States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000), which applies to both scientific
7 and non-scientific testimony. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147
8 (1999) (applying *Daubert* to all expert testimony, not just scientific testimony);
9 *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004).
10 Under Rule 702, the Court must assure itself of two things: that "any and all scientific
11 testimony or evidence admitted is not only relevant, but reliable." *Daubert I*, 509 U.S. at
12 589.

13 Where, as here, experts are retained to offer non-scientific testimony, the reliability
14 inquiry will "depend[] heavily on the knowledge and experience of the expert, rather than
15 the methodology or theory behind it." *Hangarter v. Provident Life and Accident Ins. Co.*,
16 373 F.3d 998, 1017 (9th Cir. 2004) (quoting *Hankey*, 203 F.3d at 1169)). It is generally
17 said that "[d]isputes as to the strength of [an expert's] credentials, faults in his use of [a
18 particular] methodology, or lack of textual authority for his opinion, go to the weight, not
19 the admissibility of his testimony." *Kennedy v. Collagen Corp.*, 161 F.3d 1226, at 1231
20 (9th Cir. 1998) (quoting *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir.
21 1995)).

22 The second prong, relevance, focuses on whether the expert testimony "fits" the
23 facts of the trial. That is, the testimony must be "relevant to the task at hand" in that it
24 "logically advances a material aspect of the proposing party's case." *Daubert v. Merrell*
25 *Dow Pharms. Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) ("*Daubert II*"). At bottom, the
26 dispositive question for the relevance prong is whether the proposed testimony "will
27 assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*
28 *I*, 509 U.S. at 591; *Elsayed Mukhtar v. Cal. State. Univ., Hayward*, 299 F.3d 1053, 1063

1 n.7 (9th Cir. 2002), *amended by* 319 F.3d 1073 (9th Cir. 2003) (“Encompassed in the
2 determination of whether expert testimony is relevant is whether it is helpful to the jury,
3 which is the ‘central concern’ of Rule 702.”).

4 To the extent that an expert purports to offer a legal opinion on an ultimate issue,
5 such testimony must be excluded because “offering legal conclusion testimony invades
6 the province of the trial judge.” *Nationwide v. Kass Info. Sys., Inc.*, 523 F.3d 1051, 1059
7 (9th Cir. 2008); *Mukhtar*, 299 F.3d at 1066 n.10 (“[A]n expert witness cannot give an
8 opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law.”). In
9 breach of contract cases, the expert may not be allowed to opine on the meaning and
10 import of disputed terms. *See PMI Mortg. Ins. Co. v. Am. Int’l Specialty Lines Ins. Co.*,
11 291 F. App’x. 40, 41 (9th Cir. 2008) (unpublished) (“The expert testimony proffered by
12 AISLIC went to the interpretation of the underlying settlement agreement, a contract, an
13 ultimate question of law upon which the opinion of an expert may not be given.”). To
14 permit any such testimony would be to commit error, as it is well-known that matters of
15 law are generally “inappropriate subjects for expert testimony.” *Aguilar v. Int’l*
16 *Longshoremen’s Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992).

17 As a corollary of this principle, expert conclusions which do not inform the jury
18 about the facts but which “merely function like jury instructions,” are impermissible. *Lee*
19 *v. First Nat’l Ins. Co.*, No. CV0906264MMMCWX, 2010 WL 11549637, at *10 n.80
20 (C.D. Cal. Dec. 22, 2010) (quoting Charles A. Wright et al., FED. PRAC. & PROC. EVID. §
21 6265.2 (2d ed.)); *accord Nationwide*, 523 F.3d at 1060. On one level, they are improper
22 because they invade the province of the court to instruct the jury as to the law. *United*
23 *States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993) (“Resolving doubtful questions
24 of law is the distinct and exclusive province of the trial judge.” (internal quotation marks
25 omitted)). And on another, they do not “help” the jury within the meaning of Rule 702,
26 as they “do nothing more for the jury than tell it what verdict to reach.” *Lee*, 2010 WL
27 11549637, at *10.

28 **III. Motion to Exclude Kevin M. Jans’s Expert Testimony**

1 On May 9, 2017, Bona Fide designated Mr. Jans as an expert who may testify on:
2 “(a) the likelihood that Bona Fide would have been awarded each of the opportunities
3 alleged in Bona Fide’s First Amended Complaint and Supplemental Complaint, but for
4 SourceAmerica’s breach of the July 2012 Settlement Agreement;” (“Opinion A”); “(b)
5 how the AbilityOne program functions;” (“Opinion B”) and “(c) how SourceAmerica
6 abused its role in the AbilityOne program to Bona Fide’s detriment” (“Opinion C”).
7 (ECF No. 521-4, at 2 (Sealed).)

8 SourceAmerica seeks to exclude Mr. Jans’s testimony as to each of the three above
9 opinions (ECF No. 521). For the reasons articulated below, the Court will deny
10 SourceAmerica’s motion to exclude Mr. Jans’ testimony as to Opinions B and C and
11 grant it in part with respect to Opinion A.

12 **A. Jans’s Opinions on How the AbilityOne Program Functions (Opinion B),**
13 **and How SourceAmerica Abused its Role in the AbilityOne Program to**
14 **Bona Fide’s Detriment (Opinion C)**

15 Mr. Jans dedicates the first substantive section of his expert report to describing his
16 understanding of how the AbilityOne Program functions. (ECF No. 535-10 (Sealed).)

17 Mr. Jans begins by articulating the “traditional” government procurement process
18 in terms of the “Acquisition Time Zones,” a conceptual framework he devised. (*Id.* at
19 17–21.) The Acquisition Time Zones charts out the four stages of the government buying
20 process, whereby the government first defines its needs, conducts market research to see
21 capabilities of potential contractors who might fulfill those needs, requests proposals, and
22 ultimately evaluates and selects from proposals submitted by offerors.

23 Next, Mr. Jans juxtaposes the traditional procurement process with that conducted
24 by SourceAmerica under Ability One. (*Id.* at 22–31.) According to Mr. Jans, there are a
25 few critical factors distinguishing the two. The first lies in SourceAmerica’s relative
26 autonomy, from both AbilityOne Commission oversight and from Federal Acquisitions
27 Regulation (“FAR”) principles requiring full and open competition in the government’s
28 solicitation of contracts. (*Id.* at 22 (citing FAR. 6.302-5(b)(2) (exempting the AbilityOne

1 Program from the dictates of FAR 6.101, which prescribes “full and open
2 competition”))). The second major difference adheres in Mr. Jans’s assessment that,
3 although the AbilityOne Commission technically has final say in accepting or rejecting
4 any NPA recommendations propounded by SourceAmerica, SourceAmerica is the de
5 facto deciding entity. (*Id.* at 26.) In Mr. Jans’s experience with federal government
6 contracting, it is “exceedingly rare for the buying authority [in this case, the AbilityOne
7 Commission] to NOT take the recommendation of the evaluation team.” (*Id.*)

8 Mr. Jans recognized that the special features of SourceAmerica’s acquisitions
9 process were designed to serve the AbilityOne Program’s goal of creating more jobs for
10 the blind and severely handicapped. (*Id.* at 33.) Dispensing with competitive bidding
11 procedures and having relative autonomy to structure each step of the buying process
12 would enable the AbilityOne Program to discharge its mission.

13 At the same time, the confluence of these unique factors makes SourceAmerica’s
14 administration of the AbilityOne Program especially vulnerable to abuse and
15 manipulation at every stage of the acquisitions process. Mr. Jans opines that
16 SourceAmerica’s “wide latitude to structure the acquisition process . . . [down to] how
17 the evaluation criteria in [each Opportunity Notice] are structured, the evaluation of
18 proposals from the NPAs, and the ‘recommendation’ of the NPA,” (*id.* at 32), lends itself
19 to easy exploitation by those with conflicts of interest. (*Id.* at 38.) Those conflicts, he
20 asserts, come in three flavors: contracts awarded “1) to [SourceAmerica] itself, 2) to non-
21 profit NPAs owned by its members of its Board of Directors, and even 3) to NPAs who
22 hire SourceAmerica employees after a contract is distributed to them.” (*Id.* at 42.)
23 Concomitant with this vulnerability to conflicts of interest, and perhaps, as a result of it,
24 is SourceAmerica’s preference for large NPAs. Mr. Jans’s assessment is that
25 SourceAmerica promotes the interest of a group of favored, larger NPAs, to whom it
26 awards contracts, and who, as a result of those contracts, become more sophisticated and
27 increasingly eligible to take on more and more complex (and lucrative) contracts. (*Id.* at
28 39–41.)

1 According to Mr. Jans, SourceAmerica makes decisions at key points in the
2 acquisition process to favor, or disfavor certain NPAs. For example, SourceAmerica is
3 alleged to have quietly “structur[ed bidding] requirements to exclude small NPAs,
4 including Bona Fide.” (*Id.* at 32.) Exclusionary practices manifest in a number of ways.
5 Sometimes, SourceAmerica would elect to bundle multiple service requests together
6 under one larger Opportunity rather than segregate them out into smaller, separate
7 Opportunities more likely to be won by smaller NPAs. Other times, SourceAmerica
8 would require NPAs to have expensive certifications not required or mandated by the
9 federal customer. Other times yet, SourceAmerica is accused to have made ex post facto
10 changes to contract requirements after Sources Sought Notices had already been issued to
11 the public, changes which benefited a favored NPA over another.

12 SourceAmerica challenges the above testimony on only one ground: Mr. Jans’s
13 lack of qualifications to opine specifically on the AbilityOne Program. (*See* 521-1, at 14–
14 16.) SourceAmerica asserts that Mr. Jans had no experience with the AbilityOne
15 Program prior to his retention as an expert, and that he had spent an inadequate amount of
16 time (20 to 30 hours) familiarizing himself with the particularities thereof. (*Id.* at 15.)

17 The Court cannot agree that Mr. Jans’s opinions are made without “knowledge,
18 skill, experience, training, or education,” as SourceAmerica alleges. *Jinro Am., Inc. v.*
19 *Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001). Mr. Jans has worked in the field
20 of government contracting for 22 years, and spent 15 of those years at the Department of
21 Defense in various roles including Contract Specialist, Contracting Officer, and
22 Procurement Analyst. (ECF No. 558-28, at 2–4.) In those positions, Mr. Jans supported,
23 managed, led, reviewed, and advised on high dollar-value government contracts relating
24 to a wide variety of goods and services, including those attached to base operations,
25 facilities management, software development, logistics, and more. (*Id.* at 5–6.) Mr.
26 Jans’s work at the DoD required him to develop acquisition strategies and management
27 processes, to operate pursuant to the applicable federal regulations and rules, and, at one
28 point, to contribute to drafting a section of the FAR pertaining to conflicts of interest.

1 (*Id.* at 12–13.) While at the DoD, Mr. Jans earned a Masters of Arts degree in Human
2 Resources Development from Webster University, in addition to other credentials from
3 various contract management training programs. (*Id.* at 23–26, 27–29.) Mr. Jans’s
4 knowledge, skill, experience, training, and education in the general field of federal
5 government acquisitions is demonstrable.

6 Moreover, that Mr. Jans had no previous experience with the AbilityOne Program
7 does not detract from his qualifications to testify to how the program functions.
8 SourceAmerica relies on *George v. Morgan Const. Co.*, 389 F. Supp. 253, 259 (E.D. Pa.
9 1975), to argue that Mr. Jans must “show special knowledge of the very question upon
10 which he is to express an opinion,” knowledge which it contends Mr. Jans does not
11 possess with respect to the AbilityOne Program. However, Rule 702 “contemplates a
12 broad conception of expert qualifications.” *Thomas v. Newton Int’l Enters.*, 42 F.3d
13 1266, 1269 (9th Cir. 1994). In that regard, so long as the expert’s testimony remains
14 “within the reasonable confines of his subject area,” it is admissible. *Avila v. Willits*
15 *Env’tl. Remediation Trust*, 633 F.3d 828, 839 (9th Cir. 2011) (quoting *Ralston v. Smith &*
16 *Nephew Richards, Inc.*, 275 F.3d 965, 969–70 (10th Cir. 2001). A lack of specialization
17 as to the AbilityOne acquisitions process goes to the weight of Mr. Jans’s testimony, not
18 to its admissibility. *See Karmelich v. Transportacion Maritima Mexicana S.A. de C.V.*,
19 114 F.3d 1194, 1997 WL 289476, at *1 (Table) (9th Cir. 1997) (holding expert’s general
20 knowledge of cargo vessel design qualified him to testify to the standard of care for
21 longshoremen working on deck because “any lack of particularized expertise would go
22 only to the weight of his testimony”) (citing *United States v. Garcia*, 7 F.3d 885, 890 (9th
23 Cir. 1993)).

24 Nor does *Dickman v. Alvarado Hosp. Med. Ctr., Inc.*, a case offered by Source
25 America, persuade the Court otherwise. No. 02CV2371-BEN (WMc), 2006 U.S. Dist.
26 LEXIS 83626 (S.D. Cal. Nov. 14, 2006). There, the district court precluded an expert
27 with plastic surgery expertise from offering testimony on the subject of urology. Its
28 rationale was two-fold: first, the court noted that the expert had been the subject of

1 twenty-six malpractice actions and had his medical license revoked for gross negligence.
2 *Id.* at 11. Second, the court held that “specialized knowledge on training on some other
3 issue,” i.e., as to sex change operations and plastic surgery, “did not render him an expert
4 on the issues before the Court.” *Id.* at 12.

5 *Dickman* is entirely inapposite to the case at hand: the distance between federal
6 acquisitions under FAR and federal acquisitions under AbilityOne is hardly comparable
7 to the distance between cosmetology and urology. Here, Mr. Jans relied on his
8 qualifications in the field of government acquisitions under FAR to deliver testimony on
9 a closely-related matter—acquisitions under AbilityOne. Moreover, he researched
10 AbilityOne by perusing both publicly-available materials and documents made available
11 during the course of this litigation, consulting “a former contracting officer” with
12 experience as to AbilityOne, and reviewing statements made by Ms. Jean Robinson,
13 SourceAmerica’s then-General Counsel, about how SourceAmerica conducts its source-
14 selection process. (ECF No. 535-10, at 15–16.) Although it is a fair question whether 20
15 to 30 hours dedicated to studying AbilityOne is sufficient, the answer to that question
16 goes to weight, not admissibility.

17 SourceAmerica’s challenge as to Mr. Jans’s qualifications are unavailing.
18 Accordingly, the Court will deny its motion to exclude Mr. Jans’s testimony as to the
19 AbilityOne Program (Opinion B), and how SourceAmerica utilized its role in AbilityOne
20 (Opinion C).

21 **B. Opinion on the likelihood that Bona Fide would have been awarded each of**
22 **the opportunities alleged in Bona Fide’s First Amended Complaint and**
23 **Supplemental Complaint (Opinion A)**

24 The remainder of Mr. Jans’s expert report focuses on the relationship between
25 SourceAmerica’s conduct and the harm alleged by Bona Fide (Opinion A). Mr. Jans
26 states that SourceAmerica “did not provide that Bona Fide was treated objectively, fairly
27 and/or equitably in the allocation of the contracts reviewed for this report, as promised in
28 the 2012 Settlement Agreement,” and that, “but for SourceAmerica’s [inequitable

1 actions], it was reasonably probable that Bona Fide would have been allocated the
2 contract [sic] resulting from the [Opportunity Notices discussed] in this report.” (ECF
3 No. 535-10, at 47.)

4 At issue is the latter half of Mr. Jans’s opinion which pertains to causation.
5 SourceAmerica objects that Mr. Jans’s ultimate conclusion—that Bona Fide was
6 reasonably likely to have won the contested contracts, “but for” SourceAmerica’s unfair
7 and inequitable conduct—is the product of faulty and unreliable methodology. (See ECF
8 No. 521-1, at 17.)

9 Specifically, SourceAmerica faults Mr. Jans for not performing “a comparative
10 analysis of the NPA responses submitted to SourceAmerica.” (ECF No. 521-1, at 17.)
11 SourceAmerica’s position is that Mr. Jans cannot possibly claim that Bona Fide was
12 reasonably likely to have prevailed on its bids if he did not juxtapose Bona Fide’s
13 qualifications against those of the other NPAs that also submitted bids. SourceAmerica
14 points out that there were anywhere between three to nine other NPA proposals submitted
15 for each Opportunity at issue. Without a comparative analysis of the relative capabilities
16 of the competing NPAs, “it is pure speculation for [Mr. Jans] to conclude that Bona Fide
17 was reasonably certain to have obtained any of the Opportunities at issue, much less all of
18 the Opportunities.” (*Id.*)

19 Under controlling caselaw, the Court need not admit an expert opinion that is
20 connected to the underlying data “only by the ipse dixit of the expert.” *Gen. Elec. Co. v.*
21 *Joiner*, 522 U.S. 136, 146 (1997). It is, in fact, incumbent on the Court to exclude such
22 testimony if it determines that “there is simply too great an analytical gap between the
23 data and the opinion proffered.” *Id.*; see also *Daubert II*, 43 F.3d at 1319 (“The trial
24 court’s gate-keeping function requires more than simply taking the expert’s word for it.”).

25 Here, the Court finds that there is no analysis or factual data contained in Mr.
26 Jans’s proffered testimony to support his conclusion that “it was reasonably probable”
27 that Bona Fide would have prevailed on all of the disputed Opportunity Notices. Despite
28 his designation as an expert on causation, the vast majority of Mr. Jans’s assessment is

1 geared toward the issue of breach—i.e., were there ways in which SourceAmerica acted
2 unfairly in structuring and administering AbilityOne Opportunities with respect to Bona
3 Fide. In contrast, there is no discussion as to how those breaches relate to Bona Fide’s
4 loss of contracts besides Mr. Jans’s ipse dixit.

5 To be admissible, Mr. Jans’s but-for causation conclusion has to have some factual
6 support. Whether or not Mr. Jans conducted the comparative analysis urged by
7 SourceAmerica, he should have—at a minimum—analyzed whether Bona Fide satisfied
8 the *legitimate* Opportunity requirements which were not tainted by SourceAmerica’s
9 unfairly-added assessment criteria. To wit, he could have attempted to identify which
10 certification requirements were borne out of conflicts of interest, and to demonstrate that,
11 with those improper requirements removed, that Bona Fide was reasonably likely to
12 prevail because it met all of the other applicable Opportunity specifications. And with
13 respect to those Opportunities for which SourceAmerica stands accused of improperly
14 bundling together, Mr. Jans might have attempted to show Bona Fide’s capacity to satisfy
15 all the requirements applicable to one of the smaller, partial contracts.

16 Mr. Jans’s analysis, however, does none of these things; instead, it focuses
17 exclusively on the wrongs perpetrated by SourceAmerica. But simply pointing out
18 SourceAmerica’s wrongful actions—i.e., its *breaches*—does not furnish any factual basis
19 for Mr. Jans’s conclusion that Bona Fide was otherwise qualified or likely to win the
20 disputed contracts as a matter of *causation*. Put differently: without evaluating Bona
21 Fide’s affirmative qualifications or pointing to any facts indicating Bona Fide’s
22 compliance with legitimate assessment criteria, how can Mr. Jans conclude that it was
23 “reasonably probable” that Bona Fide would have prevailed on any of the disputed
24 Opportunities, much less all of them?

25 By leaving the gatekeeper to guess how his conclusions are derived from any of
26 the data before him, Mr. Jans’s proffered testimony falls woefully short of the Rule 702
27 threshold. *See, e.g., Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1032
28 (C.D. Cal. 2018) (excluding an expert opinion because “[p]laintiffs do not explain how

1 [their expert's] 'observation' is in any way derived from his survey and there is no such
2 connection apparent to the Court"). This conclusion shall be excluded.

3 **IV. SourceAmerica's motion to strike Mr. Jans's Declarations**

4 SourceAmerica has also moved to strike portions of two declarations by Mr. Jans.
5 (ECF No. 575). The declarations in question were submitted in support of Bona Fide's
6 opposition to SourceAmerica's summary judgment motion (ECF No. 551-1 "MSJ
7 Declaration")) and Bona Fide's opposition to SourceAmerica's motion to exclude Mr.
8 Jan's testimony. (ECF No. 546-1 "Expert Testimony Declaration")). The declarations
9 are largely identical and run approximately 37 pages. SourceAmerica argues that Mr.
10 Jans's declarations were untimely, improper supplementations under Rule 26(e) that
11 should be stricken pursuant to Rule 37. It further contends that Mr. Jans impermissibly
12 attempts to offer an interpretation of the Settlement Agreement.

13 **1. Legal Standard**

14 Federal Rule of Civil Procedure Rule 26(e) allows parties to supplement an initial
15 expert disclosure "in a timely manner if the party learns that in some material respect the
16 disclosure or response is incomplete or incorrect, and if the additional or corrective
17 information has not otherwise been made known to the other parties during the discovery
18 process or in writing." FED. R. CIV. P. 26(e)(1).

19 However, to be proper, Rule 26(e) supplementations must be limited in scope.
20 "Rule 26(e) creates a 'duty to supplement,' not a right," *Luke v. Family Care & Urgent*
21 *Med. Clinics*, 323 F. App'x 496, 500 (9th Cir. 2009), and does not permit the "parties to
22 add information that should have been provided in the initial disclosure." *Arizona Oil*
23 *Holdings LLC v. BP W. Coast Prod. LLC*, No. CV-14-00569-PHX-GMS, 2015 WL
24 13567347, at *1-2 (D. Ariz. May 29, 2015). For example, courts have rejected
25 supplemental expert reports that: (1) "were significantly different" from the expert's
26 original report and effectively altered the expert's theories; or (2) attempted to "deepen"
27 and "strengthen" the expert's prior reports. *Copper Sands Homeowners Ass'n v. Copper*
28 *Sands Realty, LLC*, 2013 WL 2460349, at *2 (D. Nev. June 5, 2013). Courts must be

1 vigilant that Rule 26(e) does not “create a loophole through which a party who submits
2 partial expert witness disclosures can add to them to its advantage after the court’s
3 deadline for doing so has passed.” *Munchkin, Inc. v. Playtex Prod., LLC*, 600 F. App’x
4 537, 538 (9th Cir. 2015), as amended (July 31, 2015); *see also Luke*, 323 F. App’x at 500.

5 **2. Analysis**

6 SourceAmerica’s challenge to Mr. Jans’s declarations fall into three categories.
7 The Court will address them in turn.

8 **a. Expansion on the Acquisition Time Zones**

9 SourceAmerica seeks to strike Mr. Jans’s explanation of how his theory of the
10 Acquisition Time Zones applies to this case. The sections at issue are located at
11 Paragraphs 48–74 of the MSJ Declaration, and Paragraphs 48–76 of the Expert
12 Testimony Report.

13 As explained *supra*, the Acquisition Time Zones are a four-part schematic Mr. Jans
14 devised to explain the typical stages of government acquisitions. Mr. Jans relies on the
15 Acquisition Time Zones in his declarations to rebut SourceAmerica’s critique of his
16 failure to conduct a comparative analysis of NPA responses and how they fulfilled the
17 stated Opportunity criteria.

18 In his declarations, Mr. Jans explains how SourceAmerica’s tight control over
19 acquisition strategy and Opportunity design in Zones 1 and 2 (which refer to ascertaining
20 client requirements, contract formulation, and establishing selection criteria, labeled the
21 “Requirement Zone” and “Market Research Zone,” respectively), allowed it to
22 promulgate Opportunity Notices containing unfair or inappropriate evaluative criteria in
23 Zone 3 (“Request for Proposal Zone”), which in turn enabled it to assign Opportunities to
24 whichever NPA it chose in Zone 4 (“Source Selection Zone”). According to Mr. Jans,
25 given SourceAmerica’s control over the early Acquisition Time Zones, it would not make
26 sense for Mr. Jans to perform a comparative analysis, since any source-selection criteria
27 used to assign the Opportunity in Zone 4 would have been structured and manipulated by
28 SourceAmerica in the earlier zones to favor certain NPAs over others. “Looking only at

1 Zone 4,” (i.e., the ultimate selection of an NPA based on an evaluation of its ability to
2 meet the Opportunity specifications) “actually obscures the fact that the evaluation
3 reports are in large part a *result* of what Source America did or did not do in zones 1, 2,
4 and 3.” (ECF No. 558-28, at 34 (Sealed)). “Such a narrow approach ignores all the
5 decisions in the other three zones.” (*Id.* at 35.)

6 SourceAmerica seeks to strike this aspect of Mr. Jans’s declarations as an untimely
7 attempt to register additional opinions past the Court’s deadline for expert disclosures.
8 SourceAmerica contends that the Acquisition Time Zones were but a marginal part of
9 Mr. Jans’s expert report, and that the marquee role they took in Mr. Jans’s declarations
10 transformed his opinion to a wholly new opinion. SourceAmerica contends that Mr. Jans
11 devoted no more than two pages of his expert report to the Acquisition Time Zones, and
12 now, they are “suddenly front and center as his unifying theory” in the declarations.
13 (ECF No. 575, at 10.)

14 In response, Bona Fide argues that Mr. Jans’s reliance on the Acquisition Time
15 Zones framework is replete throughout Mr. Jans’s original report and that his declarations
16 were offered in response to SourceAmerica’s criticism of his methodology. (ECF No.
17 585, at 4–5.) Thus, according to Bona Fide, any invocation of the Acquisition Time
18 Zones in the declaration were not supplementations because they were previously
19 disclosed in the expert report.

20 The Court first agrees with Bona Fide that Mr. Jans’s discussions of the
21 Acquisition Time Zones in his declarations do not amount to new opinions. Contrary to
22 SourceAmerica’s contentions, Mr. Jans had in fact incorporated his theory of Time
23 Acquisition Zones throughout his expert report. While he did not always refer to the
24 Time Acquisition Zones by name, it is clear that the foundation of Mr. Jans’s expert
25 report was predicated on the Time Acquisition Zones framework. At the outset of his
26 report, Mr. Jans explains that “the focus of this report is the allocation of contracts that
27 happens in Acquisition Time Zones.” (ECF No. 535-10, at 20.) He keeps his promise by
28 making reference the different stages of the source-selection process throughout his

1 report. For example, under Trend 1 of his expert report, in which he discusses
2 SourceAmerica’s “[i]nfluence (and control) of entire acquisition process,” he identifies
3 how the four stages of the Acquisition Time Zones cohered with the way that
4 SourceAmerica itself marketed its operational procedures. (*Id.* at 32–33.) In that
5 discussion, Mr. Jans identifies how with respect to the Requirements Zone (Zone 1),
6 SourceAmerica would “[c]ollaborate with its subject matter experts to build the
7 Performance Work Statement,” how it “[c]onducted Market research and coordinat[ed]
8 site visits” in the Market Research Zone (Zone 2), “[a]dvert[ised] the RFP (as a SSN)”
9 within the Request for Proposal Zone (Zone 3), and “[e]valuated offers, negotiat[ed] and
10 determin[ed] responsive NPA and start up assistance” in the Source Selection Zone (Zone
11 4). Furthermore, Mr. Jans analyzed at least several of the Opportunities at issue
12 explicitly through the lens of SourceAmerica’s conduct at each stage of the Acquisition
13 Time Zones. (*See id.* at 50 (SSN 1690/1741); *id.* at 56 (RFI 1953/SSN 2075).)

14 With respect to the Acquisition Time Zones, the Court holds that Mr. Jans’s
15 declarations do not impermissibly expand beyond what was already inherent and
16 contained in his expert reports. Having compared the declarations to the original report,
17 the Court is satisfied that Mr. Jans’s declarations do not present new theories or new
18 evidence. As discussed *supra*, Mr. Jans had timely disclosed in his expert report the
19 Acquisition Time Zones framework and his intent to rely on that schematic to explain
20 SourceAmerica’s control over every aspect of the AbilityOne acquisitions process. His
21 expert report contained much more than mere passing reference to the Acquisition Time
22 Zones. The Acquisition Time Zones were as much woven into the fabric of his expert
23 report as they were in his declarations—the only difference is that he referred to them
24 more frequently by name in the latter.

25 Where, as here, the “declarations contain no new material information and present
26 no opinions that were not provided to [the opposing party] during the course of
27 discovery,” there has been no violation of Rule 26(e) and no basis to strike. *Bryant v.*
28 *Wyeth*, No. C04-1706 TSZ, 2012 WL 11924298, at *3 (W.D. Wash. July 19, 2012). As

1 Bona Fide points out, “there is no requirement that [Rule 26] disclosures cover any and
2 every objection or criticism of which an opposing party to complain,” and consequently,
3 its expert “need not stand mute in response to an opposing party’s Daubert motion” and
4 summary judgment motion. (ECF No. 585, at 4 (quoting *Star Ins. Co. v. Iron Horse*
5 *Tools, Inc.*, No. 1:16cv48-SPW-TJC, 2018 U.S. Dist. LEXIS 45660, at *17 (D. Mont.
6 Feb. 7, 2018).) That is true especially where, as here, Mr. Jans’s declarations do not alter
7 any of his theories, *Copper Sands*, 2013 WL 2460349, at *2, and instead “merely expand
8 upon or clarify initial opinions that the [opposing party] had an opportunity to test during
9 discovery.” *Wilson Road Dev. Corp. v. Fronabarger Concreters Inc.*, 971 F. Supp. 2d
10 896, 903 (E.D. Mo. 2013).

11 In short, the Court finds Paragraphs 48–74 of the Expert Testimony Declaration
12 and Paragraphs 48–76 of the MSJ Declaration to be permissible. Those paragraphs will
13 not be stricken. To the extent that SourceAmerica has raised *Daubert* concerns about the
14 Acquisition Time Zones for the first time in its motion to strike, those challenges are
15 denied as having been waived. (ECF No. 575, at 13–17.)² Given that the Acquisition
16 Time Zones were disclosed pursuant to Mr. Jans’s initial expert report, any objections
17 thereto should have been mounted with SourceAmerica’s motion to exclude his
18 testimony.

19 **b. Correction of Deposition Testimony**

20 The second basis for SourceAmerica’s motion to strike lies in Paragraphs 75–80 of
21 the Expert Testimony Declaration and Paragraphs 77–82 of the MSJ Declaration. Those
22 paragraphs provide background for the errata sheet Mr. Jans submitted to correct an error
23 in his deposition testimony. (ECF No. 558-28, at 167.) At his June 14, 2018 deposition,
24 Mr. Jans was asked “Though you did not review the responses of the eight responding
25

26 ² In any event, the Court is not concerned by SourceAmerica’s arguments that the Acquisition
27 Time Zones are not reliable and not peer-reviewed. The Acquisition Time Zones are a conceptual
28 framework, not a test or methodology or technique subject to scientific testing. Moreover, the
Acquisition Time Zones adequately fits the particular facts of this case, and will advance the jury’s
understanding of the issues.

1 NPAs for opportunity 1483, you, nevertheless, concluded that Bona Fide was the most
2 qualified for opportunity 1483; is that correct?” After Bona Fide’s attorney lodged an
3 objection, Mr. Jans responded, “Yes.” (ECF No. 558-28, at 167 (Sealed).) The errata
4 sheet indicates that the transcript should be corrected so that “Yes,” is replaced by “I did
5 not reach that conclusion.” (ECF No. 558-28, at 167.)

6 Mr. Jans’s declarations expand on the reason for correction provided in the errata;
7 namely that he had been confused by the question posed by SourceAmerica’s counsel,
8 and that he had never meant to imply, based off of his response, that he believed that
9 SourceAmerica had been in the business of making its source-selection decisions
10 according to an objective, “best qualified” NPA standard. (ECF No. 558-28, at 35; *id.* at
11 167.) Mr. Jans states that he had not meant to agree with the substance of the question,
12 and that his answer “yes,” should be construed as a misunderstanding of the question
13 posed, especially since he had, prior to that point, consistently opined that
14 SourceAmerica selected NPAs based on its own subjective, biased criteria. (ECF No.
15 558-28, at 36.) SourceAmerica contends that Mr. Jans’s original deposition testimony
16 should stand as a concession that it was in fact recommending only the best qualified
17 NPA, and that the errata and explanation thereof should be stricken as a new,
18 impermissible departure from that concession.

19 The Court agrees that the contended statements need not be stricken. Pursuant to
20 Rule 30(e)(1)(B), Mr. Jans was entitled to make corrections to his deposition transcript so
21 long as he “sign[ed] a statement listing the changes and the reasons for making them.”
22 FED. R. CIV. P. 30(e)(1)(B). Mr. Jans’s timely errata sheet accomplished such a purpose.
23 The Ninth Circuit has approved of supplementations in similar circumstances: “the non-
24 moving party is not precluded from elaborating upon, explaining, or clarifying prior
25 testimony elicited by opposing counsel on deposition [or] minor inconsistencies that
26 result from an honest mistake.” *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir.
27 1995). Because the paragraphs of the declarations at issue served only to further explain
28

1 the circumstances giving rise to the errata, and because there was no dramatic change in
2 opinions expressed, the Court finds no Rule 26 violations.

3 There are no grounds for granting this part of SourceAmerica's motion to strike.

4 **c. Interpretation of the Settlement Agreement**

5 Bona Fide has also moved to strike Paragraph 79 of the Expert Testimony
6 Declaration and Paragraph 81 of the MSJ Declaration. In that paragraph, Mr. Jans
7 provided the opinion that "SourceAmerica's 'best efforts' under the Settlement
8 Agreement could have included singling out Bona Fide as a NPA that is new to the
9 program or have been affiliated for some time but are actively pursuing AbilityOne
10 contracts."

11 The Court agrees that this passage must be stricken because it offers to interpret a
12 legal contract. "[E]xpert testimony [regarding] the interpretation of a contract [is] an
13 ultimate question of law upon which the opinion of an expert may not be given."
14 *Hornish v. King Cty.*, 182 F. Supp. 3d 1124, 1133–34 (W.D. Wash. 2016) (quoting *PMI*
15 *Mortgage Ins. Co. v. Amer. Int'l Specialty Lines Ins. Co.*, 291 F. App'x. 40, 41 (9th Cir.
16 2008) (unpublished)). Mr. Jans is not specially trained in law, and cannot be permitted to
17 give any insight as to what obligations, rights, and duties flow from the Settlement
18 Agreement.

19 SourceAmerica also objects to portions of Mr. Jans's supplemental expert report
20 and deposition answers for engaging in a similar attempt to construe the Settlement
21 Agreement. At issue are comments made by Mr. Jans registering his belief that the
22 Settlement Agreement obligated SourceAmerica to tailor opportunities to suit Bona
23 Fide's specifications and conferred upon Bona Fide a right to preferential treatment, over
24 and above any other NPA which did not have such a contract with SourceAmerica.
25 Although SourceAmerica should have raised these issues as part of the *Daubert* motion,
26 the Court will overlook the dilatory nature of these objections because the testimony they
27 challenge is clearly impermissible. As detailed more closely in the Court's summary
28 judgment order, Mr. Jans's contract interpretation is incorrect. For that reason, and

1 because Mr. Jans cannot is not qualified to render legal opinions, these opinions will be
2 excluded. *See Nationwide*, 523 F.3d at 1059 (quotation marks and citation omitted)
3 (affirming exclusion of expert legal testimony because it not only invaded the province of
4 the trial judge, but also constituted erroneous statements of law, and permitting it “would
5 have been not only superfluous but mischievous.”).

6 **V. Motion to Exclude Mary Karen Wills’s Expert Testimony**

7 Also pending before the Court is Bona Fide’s motion to exclude the expert
8 testimony of Mary Karen Wills. (ECF No. 561.) Ms. Wills has been a CPA for 30 years
9 and serves as the leader of the Government Contracts Practice at the Berkeley Research
10 Group, LLC. (ECF No. 541, at 6 (Sealed).) SourceAmerica retained Ms. Wills to offer
11 opinions on the regulatory regime governing SourceAmerica’s selection process,
12 primarily to rebut Bona Fide’s claim that SourceAmerica selected its favored NPAs
13 without regard to fair evaluative procedures when reviewing NPA responses. Ms. Wills
14 has an extensive experience in federal government procurement laws and regulations.
15 (*Id.*) She has previously worked with the AbilityOne Program in her capacity as a
16 consultant to a CNA, and to a prime contractor working with an NPA. (*Id.*)

17 Ms. Wills completed her expert report on January 19, 2018, and submitted a
18 rebuttal report to Mr. Jans’s expert report on March 16, 2018. In those documents, and in
19 her depositions, Ms. Wills has indicated that her testimony will include the following
20 opinions: that SourceAmerica’s obligations under the Settlement Agreement were
21 coterminous with its obligations to follow applicable federal regulations in designing and
22 assigning AbilityOne Opportunities, and that SourceAmerica complied with both in its
23 source-selection process with respect to the Opportunities at issue (Opinion 1); that
24 SourceAmerica did not violate any federal conflict of interest policy in assigning the
25 same (Opinion 2); that Bona Fide failed to exhaust available avenues to appeal
26 SourceAmerica’s NPA recommendations (Opinion 3); that Bona Fide’s Amended and
27 Supplemental Complaints contain false, misleading and inaccurate allegations (Opinion
28 4); and that the opinion of Bona Fide’s expert, Mr. Jans, is not reliable (Opinion 5).

1 Bona Fide objects to these opinions and moves to exclude Ms. Wills’s testimony in
2 full. It argues that Ms. Wills purports to offer improper legal conclusions, that there is
3 too great an analytical gap between the facts and her opinions, that parts of her opinions
4 require no specialized knowledge, and that her opinions would confuse the jury. Bona
5 Fide also urges the Court to apply exclusion sanctions under Rule 37 because Ms. Wills
6 did not timely disclose all of the documents she considered in drafting her expert reports,
7 and because she destroyed all of the notes and working papers she authored in the case.
8 SourceAmerica defends its expert on the grounds that legal opinions are appropriate in
9 cases involving complex regulatory frameworks, that Ms. Wills’s expertise would be
10 helpful in guiding the factfinder through labyrinthian regulatory standards, and that any
11 nondisclosure by Ms. Wills was harmless.

12 **A. Opinion 1: Testimony as to legal issues, contract interpretation,**
13 **regulatory and statutory regimes, and regulatory compliance**

14 Ms. Wills is prepared to opine that SourceAmerica did not breach its contractual
15 obligations under the Settlement Agreement vis-à-vis the Opportunities in dispute. As
16 Bona Fide points out, her ultimate conclusion on the matter is derived from a series of
17 constituent opinions. Those opinions are that SourceAmerica’s duties to treat Bona Fide
18 fairly, equitably, and objectively under the Settlement Agreement are the same as its
19 ordinary duties under the governing statute (FAR) and regulations (AbilityOne-specific),
20 that SourceAmerica adequately distilled the essence of those statutes and regulations into
21 its own internal policies, and that, by following its own internal policies when conducting
22 the source-selection process for the disputed Opportunities, SourceAmerica not only
23 complied with the applicable statutory and regulatory demands, but also the terms of the
24 Settlement Agreement.

25 Bona Fide’s primary objection is that Ms. Wills purports to offer an opinion on an
26 ultimate issue of law—i.e., that SourceAmerica did not breach the Settlement Agreement.
27 Bona Fide claims that Ms. Wills not only attempts to interpret the terms of the Settlement
28 Agreement, but also impermissibly equates its terms with requirements in the Federal

1 Acquisition Regulations, AbilityOne Commission Policies, and internal SourceAmerica
2 policies. Bona Fide believes that it is a legal opinion for Ms. Wills to testify that
3 SourceAmerica's source-selection process was compliant with regulatory requirements.
4 It further contends that the perniciousness of such an opinion is magnified, where, as
5 here, the expert would testify that compliance with internal SourceAmerica policy and
6 regulations is compliance with the Settlement Agreement.

7 In response, SourceAmerica retorts that it would welcome a limiting instruction
8 that Ms. Wills cannot opine on whether SourceAmerica breached the Settlement
9 Agreement. It frames Ms. Wills' testimony as providing only "the general regulatory
10 requirements and procedures of the AbilityOne Program and SourceAmerica's
11 compliance therewith," (ECF No. 550, at 7), and as "set[ting] forth necessary background
12 information regarding the regulatory framework as an alternative explanation for
13 SourceAmerica's decision-making that Bona Fide contends was *ad hoc* and
14 standardless." (*Id.* at 13.) SourceAmerica further contends that even though Ms. Wills
15 would testify that SourceAmerica's internal source-selection policies are compliant with
16 the applicable AbilityOne Program regulatory requirements, such an opinion would not
17 be problematic because regulatory compliance is "not the ultimate issue in this case,"
18 since the crux of the litigation is "whether SourceAmerica breached the Settlement
19 Agreement under Virginia law." (*Id.* at 14.)

20 **1. Permissible testimony: Ms. Wills may testify as to the *general* regulatory**
21 **framework**

22 Bona Fide is correct that "'matters of law' are generally inappropriate subjects for
23 expert testimony." *Flores v. Arizona*, 516 F.3d 1140, 1166 (9th Cir. 2007), *rev'd on*
24 *other grounds sub nom. Horne v. Flores*, 557 U.S. 433 (2009). This is especially true
25 when an expert witness purports to offer "an opinion as to her *legal conclusion*, i.e., an
26 opinion on an ultimate issue of law." *Nationwide*, 523 F.3d at 1058 (citation and
27 quotation marks omitted). Case law states in no uncertain terms that experts are
28 forbidden from testifying to an ultimate legal conclusion. *See, e.g., Andrews v. Metro-*

1 *North Commuter R. Co.*, 882 F.2d 705, 708–09 (2d Cir. 1989) (expert in a negligence
2 action may not testify that a defendant railroad company was “negligent”). And with
3 respect to contract interpretation, the law is clear that “testimony cannot be used to
4 provide legal meaning or interpret [a contract] as written.” *McHugh v. United Serv. Auto.*
5 *Assoc.*, 164 F.3d 451, 454 (9th Cir. 1999) (citation omitted).

6 The Ninth Circuit recognizes a limited exception to the prohibition on legal
7 opinion testimony for “instances in rare, highly complex and technical matters where a
8 trial judge, utilizing limited and controlled mechanisms, and as a matter of trial
9 management, permits some testimony seemingly at variance with the general rule.”
10 *Flores*, 516 F.3d at 1166 (quoting *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 101
11 (1st Cir. 1997)). Pursuant to this exception, courts have at times allowed experts to
12 explain the relevant regulatory backdrop of the litigation. The exception is warranted
13 where the Court believes the jury might find the applicable regulatory background
14 complex and confusing. *See, e.g., United States v. Pac. Gas & Elec. Co.*, No. 14-CR-
15 00175-THE, 2016 WL 3268994, at *1 (N.D. Cal. June 15, 2016) (permitting expert
16 testimony as to regulations attendant to the Pipeline Safety Act because “expert testimony
17 to help the jury digest this complex regulatory framework is necessary and warranted”).

18 As the parties’ extensive briefing on the issue suggests, the applicable regulatory
19 framework is complex. Ms. Wills may therefore be permitted to offer expert testimony
20 as to the *general* standards, criteria, and regulations to be observed by SourceAmerica in
21 designing and assigning Opportunities. Indeed, the regulatory scheme implicated in this
22 matter is certainly at least as complicated as the education law and policy framework
23 presented in *Flores*, and the fact-finder would likely be benefited by an explanation of the
24 applicable standards. Testimony from Ms. Wills describing the existence of those
25 regulations, and the internal policies and procedures developed by SourceAmerica in an
26 attempt to effectuate them, would be elucidating.

1 **2. Impermissible Testimony: legal analysis, application of statutes,**
2 **regulations, and internal procedures to SourceAmerica’s allocation of the**
3 **Opportunities at issue.**

4 However, a large amount of Ms. Wills’ preferred testimony sweeps beyond mere
5 background and generalized testimony about the relevant regulatory framework. Indeed,
6 she purports to opine that SourceAmerica complied with statutory, regulatory, and
7 internal requirements in allocating the specific Opportunities at dispute in this case, and
8 that compliance therewith meant compliance with the Settlement Agreement. That is all
9 impermissible testimony. *See CFM Commc’ns, LLC v. Mitts Telecasting Co.*, 424 F.
10 Supp. 2d 1229, 1233-34 (E.D. Cal. 2005) (“While expert testimony may be permissible to
11 describe a complicated agency process, such testimony should not prescribe legal
12 standards to apply to the facts of the case.”). The impermissible opinions fall into three
13 categories.

14 **a. Ms. Wills may not interpret the Settlement Agreement or**
15 **opine that its terms are equivalent to federal regulations and**
16 **AbilityOne Commission policies**

17 Like Mr. Jans, Ms. Wills has offered her own interpretation of the terms of the
18 Settlement Agreement. For example, she states the following in her expert report:

19 In my opinion, it is evident from the record underlying each of the
20 opportunities cited in Bona Fide’s allegations that SourceAmerica has fully
21 adhered to not only the requirements placed upon it by the AbilityOne
22 Program, but also the requirements contained in the Settlement Agreement,
23 which emphasizes the same requirements as those contained in the AbilityOne
24 regulations and policies.

25 ...

26 Based on the documentation I reviewed, it is evident that SourceAmerica
27 compiled with the terms of the Settlement Agreement in making continuous
28 efforts to provide Bona Fide equal access to its services.

(ECF No. 541-1, at 38, 40 (Sealed).) Ms. Wills may not testify to these opinions because
experts cannot interpret the terms of a contract or provide legal meaning, especially

1 where, as here, the interpretation would go to the ultimate issue—i.e., whether
2 SourceAmerica’s actions put it in breach of the 2012 Settlement Agreement. *McHugh*,
3 164 F.3d at 454. This rule also precludes Ms. Wills from purporting to conclude that the
4 terms of the 2012 Settlement Agreement were coterminous with the obligations set out
5 under FAR or AbilityOne Commission policy. Not only is such an opinion an oblique
6 attempt to interpret the contract, but it is also a purely legal opinion, for which Ms. Wills
7 has no authority to issue.

8 **b. Ms. Wills may not testify that there is no daylight between**
9 **the applicable regulations and internal SourceAmerica**
10 **policies and procedures**

11 Similarly, the Court will not permit Ms. Wills to opine on the equivalency of
12 SourceAmerica’s internal evaluative procedures and policies and those inscribed in
13 federal regulations.

14 To show that SourceAmerica followed principled procedures in making its contract
15 assignment decisions, Ms. Wills draws a series of connections between internal
16 SourceAmerica policies on the one hand and federal regulations on the other. Ms. Wills
17 states that SourceAmerica must abide by regulations published at FAR 8.7, 41 CFR Part
18 51, and by the AbilityOne Commission. Those regulations establish the guidelines,
19 evaluative criteria, and principles applicable to making source-selection decisions. Ms.
20 Wills states that SourceAmerica has incorporated all of those regulations into its internal
21 policies, such that compliance with internal SourceAmerica policy means regulatory
22 compliance. (ECF No. 541, at 19–21 (Sealed).) Ms. Wills also opines that
23 SourceAmerica’s conflict of interest policies are the same as those contained in federal
24 regulations. (*Id.* at 25 (“I reviewed each of the above identified [internal SourceAmerica
25 policies] and determined that they appropriately address the requirements of the relevant
26 FAR, 41 CFR 51, and the AbilityOne Commission regulations and policies, including
27 51.301.”))

1 The Court will not permit such testimony. Whether SourceAmerica’s internal
2 policies and procedures embody the same standards as those in federal regulations is a
3 purely legal issue that SourceAmerica is welcome to argue in motions before the Court.
4 It is not, however, an appropriate subject for expert testimony. Moreover, such testimony
5 lies outside of Ms. Wills’s expertise as a CPA. Courts are not in the business of allowing
6 experts to opine on whether documents in litigation, such as SourceAmerica’s internal
7 policies, meet federal regulatory standards. *See, e.g., Stobie Creek Investments LLC v.*
8 *U.S.*, 608 F.3d 1366, 1383–84 (Fed. Cir. 2010) (affirming exclusion of expert that
9 “sought to testify about whether [a] tax opinion letter met the standards of Treasury
10 Circular 230”).

11 **c. Ms. Wills may not testify that SourceAmerica complied with**
12 **FAR, AbilityOne Commission policies, or SourceAmerica**
13 **internal policies and procedures in designing and assigning**
14 **the Opportunities challenged by Bona Fide**

15 It is also clear to the Court that Ms. Wills may not be permitted to testify that
16 SourceAmerica complied with FAR, AbilityOne Commission Policies, or internal
17 SourceAmerica procedures with respect to the Opportunities challenged by Bona Fide.
18 Those opinions are impermissible because they provide a legal conclusion about an
19 ultimate issue, *Mukhtar*, 299 F.3d at 1066 n.10 (“[A]n expert witness cannot give an
20 opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law”), and do
21 no little more for a finder of fact “than tell it what verdict to reach.” 29 Wright & Gold,
22 *FED. PRAC. & PROC: EVIDENCE* § 6264 (1st ed. 1997); *cf. United States v. Perkins*, 470
23 F.3d 150, 159–60 (4th Cir. 2006) (expert’s testimony was admissible because it did not
24 “merely [tell] the jury what verdict to reach”).

25 In this case, the ultimate issue is whether breached its contractual obligations in
26 designing and assigning the Opportunities challenged by Bona Fide. Ms. Wills’s
27 proffered testimony goes to this ultimate issue because her theory (and indeed,
28 SourceAmerica’s theory upon its motion for summary judgment) is that the Settlement

1 Agreement requires only regulatory and statutory compliance. Therefore, proffered
2 testimony that SourceAmerica has fulfilled its regulatory and statutory duties (and
3 adequately applied its internal policies) is nothing more a pure legal conclusion on an
4 ultimate issue of law, once removed. It is excludable on that basis.

5 Even if Ms. Wills had not attempted to draw the impermissible linkages between
6 the Settlement Agreement on the one hand and regulatory compliance on the other, the
7 same outcome would apply. Courts routinely exclude experts from testifying on
8 compliance with regulatory or industry standards—i.e., legal explanations and
9 conclusions. *See, e.g., Pelletier v. Main Street Textiles, LP*, 470 F.3d 48, 54–55 (1st Cir.
10 2006) (affirming exclusion of “expert testimony about the applicability of OSHA
11 regulations to [defendant]”); *Bammerlin v. Navistar Int’l Transp. Corp.*, 30 F.3d 898, 900
12 (7th Cir. 1994) (excluding expert testimony regarding compliance with Federal Motor
13 Vehicle Safety Standards); *United States v. S. Ind. Gas & Elec. Co.*, 55 Env’t Rep. Cas.
14 (BNA) 1597, 2002 WL 31427523, at *7–8 (S.D. Ind. Oct. 24, 2002) (excluding expert
15 testimony interpreting the Clean Air Act and its accompanying regulations). Although
16 SourceAmerica points out that some courts have at their discretion permitted expert
17 testimony on regulatory compliance, this Court is not prepared to allow the same in this
18 case.

19 *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012), a case relied
20 upon by Bona Fide, is instructive. At issue was the district court’s exclusion of an expert
21 who offered to dissect the defendant’s compliance with a regulatory standard, MIL-STD
22 498, in support of the qui tam plaintiff’s theory that Lockheed had defrauded the
23 government under a contract for space launch operations software. MIL-STD 498 was
24 apparently the standard requirement regarding software used in government contracts.
25 *Id.* at 1052. The expert’s opinion was offered “to determine whether Lockheed’s
26 performance under the contract did in fact violate the requirements of MIL-STD 498.”
27 *Id.* The district court excluded the testimony because those opinions amounted to legal
28 conclusions in the context of the case. *Id.* The Ninth Circuit affirmed the district court,

1 holding that not only was there no rule requiring a district court to accept such testimony,
2 but that, “even if [expert] testimony may assist the trial of fact, the trial court has broad
3 discretion to admit or exclude it.” *Id.* at 1053 (quotation marks and citation omitted); *see*
4 *also Nationwide*, 523 F.3d at 1059 (holding that there is no support for Nationwide’s
5 argument “that a district court per se abuses its discretion when it excludes testimony
6 instructing the jury on legal issues”). The same concerns which motivated the district
7 court in *Hooper* to exclude the MIL-STD 498 testimony also animate this Court to
8 exclude testimony as to compliance with FAR, AbilityOne Commission Policies, and
9 internal SourceAmerica policies and procedures.³

10 Furthermore, it is especially concerning to the Court that Ms. Wills’s conclusions
11 with respect to the individual Opportunities at issue are couched in terms of disputed
12 contractual language. For example, with respect to Opportunity Notice 1483, Ms. Wills
13 states that not only did SourceAmerica adhere to its internal policies and procedures,
14 FAR 8.7, 41 CFR 51, and Ability One Commission regulations and policies “to
15 objectively assess and recommend the most appropriate NPA based on the requirements
16 included in the Opportunity Notice,” but that “SourceAmerica’s recommendation was
17 conducted *in a fair, transparent and equitable method without impartiality and without*
18 *improper preferential treatment of any responding NPA.*” (ECF No. 541, at 36 (Sealed)
19 (emphasis added)). This opinion is included at the tail-end of all of her Opportunity-
20 specific discussions. By offering her analysis in the terms of the Settlement Agreement,
21

22 ³ It should be noted that the Court is not excluding this testimony based on Bona Fide’s argument
23 that Ms. Wills used an improper legal standard in arriving at her conclusions, that is, she used the legal
24 standard applicable to Tucker Act bid protests to evaluate whether there was a “rational basis” for each
25 one of SourceAmerica’s NPA recommendations. (ECF No. 561-1, at 22; ECF No. 573, at 6.) Based on
26 the record before the Court, there is no evidence that Ms. Wills ever evaluated SourceAmerica’s NPA
27 recommendations for rational basis. The few stray sentences in Ms. Wills’s deposition relied upon by
28 Bona Fide indicate only that Ms. Wills believed she was qualified as an expert in the AbilityOne
procurement process because she had experience with Tucker Act bid protests, and that the two
processes were more or less analogous. (ECF No. 573, at 6 (citing ECF No. 573-1, at 13).) Nowhere
does Ms. Wills state that she applied a rational basis review of SourceAmerica’s NPA recommendation
decisions. The Court will not exclude Ms. Wills’s proffered testimony on this basis.

1 (ECF No. 519-4, at 7 (obligating SourceAmerica “to use best efforts to provide that Bona
2 Fide is treated objectively, fairly, and equitably in its dealings with with
3 [SourceAmerica],” and to “use best efforts to provide that Bona Fide is afforded equal
4 access to services provided by [SourceAmerica]”)), Ms. Wills’s proposed testimony does
5 no more than tell the jury what verdict to reach on the ultimate issue, and must be
6 excluded for that reason. *See Lee*, 2010 WL 11549637, at *10.

7 **B. Testimony that Bona Fide did not pursue all available appeals to**
8 **Source America’s assignment decisions**

9 Bona Fide next argues that Ms. Wills must be precluded from opining that Bona
10 Fide “did not fully exercise the processes and avenues available to it to appeal”
11 SourceAmerica’s assignment decisions. (ECF No. 561-1, at 24.) This critique is aimed
12 at Paragraphs 238–243 of Ms. Wills’s report, in which she explained that SourceAmerica
13 had policies in place providing for appeals, that Bona Fide had pursued appeals for only
14 three of the thirteen Opportunities challenged in its pleadings, and that even those three
15 appeals had not been pursued exhaustively. (ECF No. 541-1, at 33–35 (Sealed).) Bona
16 Fide seeks to preclude this failure-to-mitigate testimony pursuant to Rule 702(a) because
17 it believes that Ms. Wills’s analysis requires no special expertise, and that the jury could
18 gain the information just by reviewing the internal appeals policies and Bona Fide’s
19 exhibits.

20 With one exception, the objected-to testimony should not be excluded. That Ms.
21 Wills’s opinions are based on a review of documents does not automatically make them
22 unhelpful to the trier of fact. Indeed, there are a high volume of documents in this case,
23 many of them involving internal SourceAmerica policy, and others which detail Bona
24 Fide’s submissions for consideration on a number of disputed Opportunities. Distilling
25 the contents of those submissions and comparing them to the available internal appeals
26 mechanisms will aid the jury’s understanding of the dispute at hand.

27 The Court is unpersuaded by Bona Fide’s reliance on *Beech Aircraft Corp. v.*
28 *United States*, 51 F.3d 834, 842 (9th Cir. 1995). Bona Fide cites *Beech Aircraft* for the

1 proposition that a jury is fully capable of examining the exhibits in the record to
2 determine the disputed issue, and that Ms. Wills's proposed testimony is unhelpful as a
3 result. (ECF No. 561-1, at 14.) *Beech Aircraft*, however, stands for a much more limited
4 proposition than Bona Fide suggests. There, the Ninth Circuit affirmed the district
5 court's exclusion of linguistics experts offered to decipher the contents of hard-to-hear
6 tape recordings, holding that "hearing is within the ability and experience of the trier of
7 fact." *Beech*, 51 F.3d at 842. The facts in *Beech* are a far cry from the situation at hand,
8 since the evaluation of NPA responses are not so clearly within the ability and experience
9 of the average person.

10 Thus, Ms. Wills will not be precluded from offering her assessment that Bona Fide
11 left certain avenues of appeals unexplored. However, it bears repeating that Ms. Wills
12 may not testify that SourceAmerica's internal appeals procedures were in compliance
13 with regulatory standards. Consistent with the Court's decision *supra*, Ms. Wills is
14 precluded from giving the opinion stated in Paragraph 240 of her expert report. (ECF
15 No. 541-1, at 34 ("[T]he appeal process set forth in Source America's procedures for
16 project development distribution and transparency meets the requirements outlined in
17 AbilityOne Policy 51.301 and 41 CFR Part 51-2.6.") (Sealed).)

18 **C. Testimony as to the validity of Bona Fide's pleadings**

19 Bona Fide seeks to preclude Ms. Wills's testimony that "Bona Fide asserts a
20 variety of factual misrepresentations in its Amended and Supplemental Complaint and
21 Interrogatory Response." (ECF No. 561-1, at 24). At issue is Ms. Wills's contention at
22 deposition that Bona Fide "knowingly made false statements of fact" in its pleadings,
23 (ECF No. 541-3, at 71-72 (Sealed)), and her conclusion at Paragraphs 61, and 244-247
24 of her expert report, that "[m]any of [Bona Fide's] allegations cannot be supported by the
25 record and misrepresent SourceAmerica's efforts to treat Bona Fide fairly and equitably
26 in the recommendation process." (ECF No. 541-1, at 35-37 (Sealed)). Bona Fide
27 contends that it is improper for Ms. Wills to impeach the veracity and validity of its
28 allegations, since expert witnesses may not testify as to credibility.

1 The Court finds the proffered testimony impermissible, but not on the grounds
2 stated by Bona Fide. The cases Bona Fide cites only forbid experts from “testify[ing]
3 specifically to a *witness’s* credibility or to testify in such a manner as to improperly
4 buttress a witness’ credibility.” *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir.
5 1989) (emphasis added). They say nothing about whether an expert may impugn the
6 credibility of allegations made by the opposing party in its pleadings.

7 Nonetheless, the Court is not prepared to allow Ms. Wills to offer what is in effect
8 an opinion on the sufficiency of Bona Fide’s legal pleadings. Such testimony is
9 impermissible because “[e]xpert evidence should not be permitted to usurp . . . the role of
10 the jury in applying the law to the facts before it.” *I Primavera Familienstiftung v. Askin*,
11 130 F. Supp. 2d 450, 528 (S.D.N.Y. 2001). If Bona Fide’s allegations are factually
12 deficient, then it is the role of the jury, as fact-finder, to so find. To aid the jury in its
13 determination, Ms. Wills may point out where, and in what manner, the *facts* detailed in
14 Bona Fide’s allegations do not find support in the documents she reviewed. But she may
15 not make a global indictment of Bona Fide’s *legal pleadings*, since this lies outside of her
16 expertise as a government contracting expert.

17 Moreover, Ms. Wills’s characterization of Bona Fide’s actions—i.e., that it made
18 “misrepresentations,” and “knowingly made false statements of fact,”—carry with them
19 connotations of deceit and willful action, which the Court finds more prejudicial than
20 probative under Rule 403. Quite apart from that, there’s no indication that Ms. Wills had
21 any personal knowledge of Bona Fide’s state of mind with regards to the statements it
22 chose to include in its pleadings. She therefore cannot purport to testify about the issue.
23 *See Applestein v. Medivation, Inc.*, 561 F. App’x 598, 600 (9th Cir. 2014) (unpublished)
24 (“Dr. Schneider’s opinion is insufficient to establish falsity adequately because he has no
25 personal knowledge of the facts on which he bases his conclusion.”).

26 **D. Testimony criticizing the opinions of Mr. Jans**

27 Bona Fide also contends that Ms. Wills improperly usurps the Court’s gatekeeping
28 role by couching her disagreement with Mr. Jans’s opinions in Rule 702 language. (ECF

No. 561-1, at 27.) Specifically, Bona Fide seeks to preclude Ms. Wills from using words like “unreliable,” “meritless,” “invalid,” and “erroneous,” to describe Mr. Jans’s methodology, and to prevent her from opining that his conclusions “have no reliable basis in fact.” (*Id.*)

The Court will not exclude this testimony. Ms. Wills is well within her rights to question the methods and conclusions of a competing expert witness. As SourceAmerica points out, Ms. Wills’s critiques are classic rebuttal testimony. Just because they are expressed in terms also germane to a *Daubert* analysis does not turn her valid rebuttal testimony into an usurpation of the Court’s gatekeeping duties.

E. Failure to disclose, and failure to preserve Rule 26(a)(2) materials

Finally, the Court will address Bona Fide’s contention that Ms. Wills’s testimony must be excluded in its entirety pursuant to Rule 37, as a result of her failure to abide by the disclosure requirements in Rule 26(a)(2). Rule 26 requires an expert like Ms. Wills to issue a written report that discloses, among other things, “the facts or data considered by the witness in forming them.” FED. R. CIV. P. 26(a)(2)(B)(ii). Rule 37(c)(1) provides that, unless the failure to disclose is harmless, or there exist substantial justification for nondisclosure, evidence not disclosed may be excluded. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (“The information may be introduced if the parties’ failure to disclose the required information is substantially justified or harmless.”)

1. Relevant Procedural Background

Ms. Wills acknowledged at a deposition on June 20, 2018, that the materials listed in her deposition did not encompass “the entire universe of documents that [she] reviewed,” and that the flash drives she had produced in response to Bona Fide’s subpoena “really contained the materials [she] relied upon and not all of the materials [she] considered.” (ECF No. 541-3, at 16, 27–28.) Ms. Wills further stated that she did not “keep track” of all the materials that she reviewed but did not rely on. (*Id.* at 10.) Among those missing materials were notes made by Ms. Wills and her staff during their

1 recreation of SourceAmerica’s evaluative process vis-à-vis the Opportunities challenged
2 by Bona Fide. (*Id.* at 50). Ms. Wills represented during the deposition that she would
3 produce those notes if she still had them.

4 After the deposition, Bona Fide moved to exclude her testimony pursuant to Rule
5 37. Bona Fide contended that Ms. Wills neglected to timely disclose in her written report
6 “all of the materials that she considered in formulating her opinions.” (ECF No. 561-1, at
7 29.) In response to Bona Fide’s motion, SourceAmerica submitted a declaration from
8 Ms. Wills that advised for the first time:

9 At deposition, I testified that I did not know whether my notes and working papers,
10 including my own evaluations of NPA responses, were produced to Bona Fide. *It is*
11 *not my practice to keep working papers, notes, or drafts, once I prepare final expert*
12 *reports. After my deposition, I verified that I followed this practice and all notes,*
13 *working papers, and drafts were not retained once my Expert and Rebuttal Reports*
14 *were each finalized.* My own evaluations of NPA responses are entirely
15 incorporated within my Expert Report; I did not create any additional analyses of
16 NPA responses other than the analysis included in my reports. Further, all
17 documents cited in support of those analyses were provided to Bona Fide prior to
18 my deposition.

19 (ECF No. 550-1, at 3 (emphasis added.))

20 Upon receiving this information, Bona Fide doubled-down on its request to
21 exclude Ms. Wills’s testimony, this time, for failing to preserve her working notes (ECF
22 No. 573, at 10–11).⁴ Bona Fide’s motion puts two issues before the Court: (1) are notes
23 and working papers subject to disclosure under Rule 26(a)(2), and (2) if so, are exclusion
24 sanctions under Rule 37 warranted in the event of their destruction?

25 **2. Analysis**

26 The disclosure mandated by Rule 26(a)(2) includes any facts or data considered by
27 the expert in forming their opinion. *See Lucent Techs. Inc. v. Microsoft Corp.*, No. 07-
28 CV-2000 H (CAB), 2010 WL 11442894, at *2 (S.D. Cal. Dec. 16, 2010). Courts have

⁴ Ms. Wills stated in her declaration that all of the materials she had relied on, except for her working notes, had since been produced to Bona Fide.

1 adopted a very broad understanding of what it means for material to have been
2 “considered” by an expert for the purposes of Rule 26(a)(2).

3 Working papers or notes generated by an expert would ostensibly fall within the
4 bounds of “considered” materials. For example, courts have defined materials
5 “considered” as “anything received, reviewed, read, or authorized by the expert, before or
6 in connection with the forming of his opinion, if the subject matter relates to the facts or
7 opinions expressed.” *Euclid Chem. Co. v. Vector Corrosion Techs. Inc.*, No. 1:05CV80,
8 2007 WL 1560277, at *4 (N.D. Ohio May 29, 2007) (footnotes and citations omitted).
9 Rule 26(a)(2) has also been construed to require the disclosure of any materials authored
10 by the expert during their consultation. *Sec. & Exch. Comm’n v. Reyes*, 2007 WL
11 963422, *1 (N.D. Cal. Mar. 30, 2007) (“When experts serve as testifying witnesses, the
12 discovery rules generally require the materials reviewed or generated by them to be
13 disclosed . . .”).

14 However, some courts have held to the contrary. Relying principally on a First
15 Circuit decision, *Gillespie v. Sears, Roebuck & Co.*, 386 F. 3d 21, 34–35 (1st Cir. 2004),
16 courts have held that the requirement to disclose any materials considered by the expert
17 does not include working notes. *Id.* (“Gillespie claims that this expert discovery rule
18 itself required the working notes because it requires a report stating the expert’s opinions
19 and reasoning and ‘the data or other information considered by the witness in forming the
20 opinions.’ But this language does not require that the expert report contain, or be
21 accompanied by, all working notes or recordings . . .”) (citing FED. R. CIV. P.
22 26(a)(2)(B)).

23 The Court, however, need not reconcile the conflicting law on the disclosure of
24 expert working notes. Even if Ms. Wills did in fact have a duty to disclose her notes in
25 accordance with Rule 26(a)(2), her failure to preserve was harmless and exclusion
26 sanctions are therefore not necessary.⁵

27
28 ⁵ The Court agrees with Bona Fide that there was no substantial justification for Ms. Wills’s
destruction of her notes. FED. R. CIV. P. 37(c)(1). As Bona Fide has pointed out, it is not enough for

1 Bona Fide argues it suffered prejudice, and that Ms. Wills’s actions were not
2 harmless under Rule 37(c)(1). It claims it has been deprived of a meaningful opportunity
3 to cross-examine Ms. Wills on her conclusions and any intervening findings she might
4 have made in her working papers at variance with her ultimate report. The Court finds
5 that while prejudice might lie in the ordinary case, *see In re Mirena IUD Products Litig.*,
6 169 F. Supp.3d 396, 472 (S.D.N.Y. 2016) (“Allowing Dr. Hixon to testify without having
7 fully disclosed the bases for her opinions is harmful to Plaintiffs because they cannot
8 effectively cross-examine her.”), the destruction of Ms. Wills’s working papers do not
9 seem particularly prejudicial in light of the factual particulars of *this* case.

10 Ms. Wills stated in her declaration that her working paper “evaluations of NPA
11 responses are entirely incorporated within [her] Expert Report.” (ECF No. 550-1, at 3.)
12 That being the case, Bona Fide could simply cross-examine Ms. Wills on the methods
13 and analysis enclosed in her final expert report. Indeed, similar quandaries were
14 presented in *Patel v. Verde Valley Med. Ctr.*, No. CV051129PHXMHM, 2009 WL
15 5842048 (D. Ariz. Mar. 31, 2009) and *Tipp v. Adeptus Health Inc.*, No. CV-16-02317-
16 PHX-DGC, 2018 WL 447256 (D. Ariz. Jan. 17, 2018). The analyses of those courts are
17 instructive.

18 In *Patel*, the defendants argued that the plaintiff’s expert “should be excluded
19 because he destroyed his notes.” 2009 WL 5842048, at *1. However, the district court
20 “decline[d] to exclude Dr. Dobson’s testimony merely because he discarded his notes,”
21 since “Defendants are free to raise th[e] issue as a means of attacking Dr. Dobson’s
22 credibility with the jury if they so desire.” *Id.* Similarly, the district court in *Tipp*

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24 _____
25 Ms. Wills to state that it was her general practice to discard her working notes. (ECF No. 573, at 10.)
26 Indeed, Ms. Wills’s general practice does not diminish the force of Bona Fide’s argument—submitted
27 upon a request for judicial notice, hereby granted—that the relevant professional standards for CPAs
28 like Ms. Wills recommend her to “prepare and maintain documentation,” including “working paper
documentation (including electronic mail, spreadsheets, and correspondence),” since “the form and
content of working papers and . . . related documentation may also be subject to discovery depending
upon the role of the practitioner.” (ECF No. 573-2, at 16, 17 (“Litigation Services and Accountable
Professional Standards,” by the American Institute of Certified Public Accountants)).

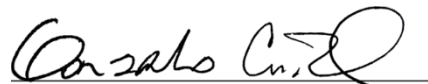
1 considered whether the defense's witness should be precluded from testifying as to her
2 investigation because she had her shredded handwritten notes. Like Bona Fide, the
3 plaintiff in *Tipp* sought to exclude the witness on the grounds that the "handwritten notes
4 were relevant and may have included additional or inconsistent information." 2018 WL
5 447256, at *5. The court rejected plaintiff's argument on the grounds that any potential
6 harm could be cured by permitting plaintiff "to present evidence of [the witness's]
7 destruction of the handwritten notes," and "to argue to the jury that the notes could have
8 been helpful to her case." *Id.*

9 The Court is not prepared to exclude Ms. Wills in light of the considered opinions
10 articulated in *Tipp* and *Patel*. If the matter is set for trial, Bona Fide will be permitted to
11 cross-examine Ms. Wills regarding her destruction of her notes and working papers, and
12 to challenge her credibility for having done so. No additional sanctions are warranted.

13 VI. Conclusion

14 Consistent with the above analysis, Bona Fide's motion to exclude the testimony of
15 Mary Karen Wills is **granted in part** and **denied in part** (ECF No. 561).
16 SourceAmerica's motion to exclude the testimony of Kevin M. Jans is also **granted in**
17 **part** and **denied in part** (ECF No. 521). SourceAmerica's motion to strike portions of
18 Mr. Jans's declarations is also **granted in part** and **denied in part** (ECF No. 575).

19 Dated: March 26, 2019



Hon. Gonzalo P. Curiel

United States District Judge